Supreme Court, U.S.
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No. 94-

SUPREME COURT OF THE UNITED STATES

October Term, 1994

DOUGLAS EDMUND MAGILL,

Petitioner,

v.

EVANS, GEORGE AND BRONSTEIN,

Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a debt for attorney fees awarded in a state court divorce decree to a bankruptcy debtor's ex-wife, who assigned the debt to the law firm that represented her in the divorce action, then filed her own Chapter 7 proceeding in which she listed that firm as a creditor and the debt was discharged, is dischargeable under 11 U.S.C. Sec. 523(a)(5) in the former husband's subsequent Chapter 7 proceeding.

LIST OF PARTIES

Petitioner, Douglas Edmund Magill, and respondent, Evans, George and Bronstein, were the only parties to this case in the United States Court of Appeals for the Fourth Circuit. They also were the only parties to the adversary proceeding in the United States Bankruptcy Court for the District of Maryland dealing with dischargeability vel non of the attorney fees debt and to the appeal to the United States District Court for the District of Maryland from the bankruptcy court's determination of that issue.

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PETITION FOR A WRIT OF CERTIORARI

Douglas Edmund Magill, petitioner, prays that a writ of certiorari issue to review the judgment of the United States

Court of Appeals for the Fourth Circuit in a cause there entitled In Re: Douglas Edmund Magill, Debtor / Douglas Edmund Magill, Plaintiff-Appellant, v. Evans, George and Bronstein, Defendant-Appellee, No. 93-2426, affirming a judgment of the United States District Court for the District of Maryland which affirmed a determination made by the United States Bankruptcy Court for the District of Maryland that a debt for attorney fees awarded Magill's former wife in a Maryland divorce judgment and assigned by her to the law firm that represented her in the divorce case was not dischargeable in Magill's Chapter 7 bankruptcy proceeding.

OPINIONS BELOW

The opinions below are not published. Copies are appended hereto. See, infra: App. 1 for the unpublished per curiam opinion of the court of appeals, filed

August 10, 1994; App. 8 for the district court's "Memorandum", filed October 12, 1993. The bankruptcy court filed no opinion or memorandum. A copy of its "Order Determining Debt to Be Non-Dischargeable Under 11 U.S.C. Section 523(a)(5)" (infra, App. 19), dated December 2, 1992, excerpts from the "Judgment of Divorce" (App. 21) entered by the Circuit Court for Baltimore County, Maryland on December 3, 1987, in part awarding the attorney fees here in issue to the law firm that represented the former wife in the divorce action, and excerpts from that court's January 19, 1988 "Memorandum Opinion and Ruling" (App. 23) dated January 19, 1988, in part modifying its fee award by making the attorney fees payable to the ex-wife, also are appended hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered August 10, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1) and Rules 12.1 and 13.1 of the Rules of the Court effective January 1, 1990, as amended to February 1, 1994.

STATUTE INVOLVED

11 U.S.C. Sec. 523 (Exceptions to discharge) provides, in part pertinent hereto, that:

> "(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt --
>
> * * * * *
>
> (5) to a spouse, former spouse, or child of the debtor for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with state or territorial law by a governmental unit, or property settlement agreement, but not to the extent that --
>
> (A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 402(a)(26) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or

> any political subdivision of such State); or
>
> (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support;"

* * * * *

STATEMENT OF THE CASE

In its judgment of divorce dated December 3, 1987 the Circuit Court for Baltimore County, Maryland, ordered, inter alia, that petitioner (hereinafter sometimes referred to as "Magill") pay part of his ex-wife's attorney fees. The judgment provided, in pertinent part, that Magill "shall contribute to the attorney's fees and expenses incurred by Barbara L. Magill in connection with the proceeding as follows: a) The sum of $55,000.00 to the law firm of Evans, George & [sic] Bronstein for counsel fees and expenses rendered in connection with

this proceeding, for which amount a money judgment is hereby entered in favor of said law firm against Douglas E. Magill; . . ." (App. 22).

On January 19, 1988, on motion filed by Barbara L. Magill, the judgment was modified to provide, in part pertinent to the fee award, that "[t]he award of attorneys [sic] fees in the amount of $55,000 and other expenses in the amount of $12,000 is made in favor of Barbara L. Magill as the contribution by Douglas E. Magill to the costs, fees and expenses incurred by Mrs. Magill. The payment is to be made directly to Barbara L. Magill." (App. 23).

On March 10, 1988 the former Mrs. Magill assigned the debt for attorney fees to the law firm. In her subsequent Chapter 7 bankruptcy proceedings in the United States Bankruptcy Court for the

District of Maryland she listed the law firm as a creditor and the attorney fees as a debt. In that proceeding the debt was discharged.

On February 5, 1992 Magill filed in the same bankruptcy court his voluntary Chapter 7 petition. In his schedules he listed Evans, George and Bronstein (as well as his former wife) as a creditor and the attorney fees award as a debt.

On May 4, 1992 Evans, George and Bronstein filed an adversary proceeding in Magill's bankruptcy case, seeking a declaration that its debt (said in its complaint then to amount to $75,537.12, due to accrual of interest) was not dischargeable. The law firm alleged in its complaint that the debt for its fees was in the nature of alimony, maintenance and support and under 11 U.S.C. Sec. 523(a)(5) was nondischargeable.

On June 26, 1992 Magill answered the complaint, asserting in part that discharge of the attorney fees debt in Barbara L. Magill's bankruptcy proceeding discharged the debt in his case as well. He stated also that Evans, George and Bronstein had no standing in the matter since by virtue of Barbara L. Magill's bankruptcy filing any monies due as a result of the attorney fee award became an asset of her bankruptcy estate, so that only her bankruptcy trustee would have standing to challenge dischargeability of the debt for that award.

On July 8, 1992 Evans, George and Bronstein filed in the bankruptcy court a motion for summary judgment. Attached as exhibits thereto and incorporated therein by reference were copies of the Maryland circuit court's judgment of divorce, the subsequent modification thereof providing

for payment of the attorney fees award directly to Barbara L. Magill and her assignment of the debt to the law firm.

On July 9, 1992 Magill answered the motion for summary judgment. He averred in part that the debt for attorney fees was not in the nature of support, that what really was being sought was payment of a judgment and that the debt was fully dischargeable in his bankruptcy proceeding.

The bankruptcy court agreed with Evans, George and Bronstein's position. On December 3, 1992 it granted the motion for summary judgment and entered an order determining the debt in issue to be non-dischargeable.

On December 14, 1992 Magill appealed to the district court, contending in part that the debt involved was dischargeable under the assignment clause contained in

11 U.S.C., sec. 523(a)(5)(A). On October 1, 1993, the district court, acting without a hearing, affirmed the order of the bankruptcy court.

On November 1, 1993 Magill appealed to the United States Court of Appeals for the Fourth Circuit. On August 10, 1994 that court, in an unpublished per curiam opinion (in which it noted in part that it "dispense[d] with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and oral argument would not aid the decisional process" (App. 7)), affirmed the district court. The court of appeals held, inter alia, that the debt involved was in the nature of alimony, maintenance and support, was not dischargeable in Magill's bankruptcy proceeding and was not rendered dischargeable by the assignment to Evans,

George and Bronstein. The court rejected Magill's reliance on the exception to non-dischargeability set out in 11 U.S.C. Sec. 523(a)(5)(A). On the same day, August 10, 1944, judgment was entered accordingly.

REASONS FOR ALLOWING THE WRIT

Certiorari should be granted in this case because the court of appeals decided an important and pervasive question of federal law pertaining to discharges in bankruptcy and did so in a manner which appears on its face to be in clear conflict with plain language of 11 U.S.C. Sec. 523(a)(5)(A), excepting from the provisions of that statute which confer nondischargeability upon certain debts, a debt which is assigned to another entity, as the debt in issue in this case clearly was. The decision of the court of appeals also may conflict with or differ from a decision of another circuit court

sufficiently to invoke the exercise of this Court's power of supervision. (The two lower federal courts which dealt with the dischargeability question, the district court and the bankruptcy court, acted in the same manner as did the court of appeals.)

As the court of appeals noted, "Section 523(a)(5)(A) excepts from discharge, a debt to a spouse or former spouse for alimony, maintenance, or support in connection with a divorce decree, 'but not to the extent that -- (A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise.'" (App. 6). Assuming, arguendo, that the debt in issue in this case is one for alimony, maintenance or support, that debt, as dealt with by Barbara L. Magill, patently satisfies all criteria of subsection (A) required to

qualify it for the exception to discharge-ability plainly stated in that enactment.

It is undisputed that the debt in issue was one due to the former Mrs. Magill by her ex-husband, the bankruptcy debtor Magill, that it was for attorney fees and expenses awarded her in connection with the modified state court divorce decree and that she voluntarily assigned that debt to her divorce case counsel, the law firm of Evans, George and Bronstein. That firm a partnership of lawyers, clearly is an "entity" within the meaning of 11 U.S.C. Sec. 101(15), which defines "entity" as"includ[ing] person, estate, trust, governmental unit, and United States trustee", and 11 U.S.C. Sec. 101(41), which defines "person" (with a proviso not here pertinent) as "includ[ing] individual, partnership, and corporation". And the entity Evans,

George and Bronstein certainly is "another" (Sec. 523(a)(5)(A)) entity than the former Barbara L. Magill. When she assigned the attorney fees debt to Evans, George and Bronstein all qualifying requirements of subsection (A) of section 523(a)(5) thus were met, the plainly stated exception to nondischargeability set out in subsection (A) of Section 523(a)(5) became operative and the debt became and was dischargeable.

The court of appeals erred in failing to recognize and give effect to that circumstance. The court simply held, relying on a bankruptcy court decision, In re Daumit, 25 B.R. 371 (Bankr. D, Md. 1982), and referring to In re Spong, 661 F,2d 6 (2d Cir. 1981), that: "Because the assignment to her attorney of the counsel fees awarded to a debtor's ex-wife does not render dischargeable the debtor's

liability to the attorney, Daumit, 25 B.R. at 373, we find that the fee awarded to Mrs. Magill, in the nature of alimony, support, and maintenance, is not rendered dischargeable in Mr. Magill's bankruptcy proceeding by the assignment of the award to Evans, George and Bronstein. See Spong, 661 F.2d at 9 (dischargeability determined by substance, not form, of liability)." (App. 6-7). The court then reiterated that "Mr. Magill's debt, in the nature of alimony,maintenance, and support, is not dischargeable in his bankruptcy proceeding" (App. 7), citing In re Silansky, 897 F.2d 743, 744 (4th Cir. (1990), and "therefore affirm[ed] the district court order affirming the bankruptcy court's declaration that the debt owed by Magill to Evans, George and Bronstein was nondischargeable." (App. 7).

It seems apparent that the court of appeals premised its disposition of this case solely on the basis of its finding that the debt involved was "in the nature of alimony, support, and maintenance". (App. 7). Such an application of Sec. 523(a)(5), especially in light of subsection (A) thereof, not only flies in the face of the plain language of that statute, but totally disregards the content, indeed the existence, of a very important part thereof, subsection (A).

That a debt is in the nature of alimony, maintenance or support supplies the essential prerequisite for application of any part of Sec. 523(a)(5), which grants the exception from dischargeability only to a debt of such nature. If a debt is not of that nature, it obviously does not in the first instance come within the ambit of Sec. 523(a)(5) and hence cannot

qualify for nondischargeability thereunder. That a debt is of such nature, however, does not at all serve to insulate it from operation of subsection (A) (the effect that the lower courts, erroneously Magill says, accorded to that nature in this case). That a debt is of a nature recognized by Sec. 523(a)(5) merely allows nondischargeability, except, as in the instant case, when the circumstances described in subsection (A) thereof are present. In that event, as the statutory language makes pellucidly plain, a debt in the nature of alimony, maintenance or support is excepted, despite its nature, from the nondischargeability status otherwise conferred by Sec. 523(a)(5).

Being in the nature of alimony, maintenance and support qualifies a debt for nondischargeability, but the presence of the factors specified in subsection (A)

divests an otherwise qualified debt of that enviable status. That is the plain meaning and import of the statute and one of the bases upon which Magill sought to have the courts below determine that the debt assigned by his former wife to Evans, George and Bronstein was dischargeable.

If the holding of the court of appeals in this case is correct, then that court has effectively removed subsection (A) (the exception to the exception from dischargeability of a debt in the nature of alimony, maintenance or support) from the statute, has thus put a critical portion of the bankruptcy law out of existence and has affirmed, approved and impressed with its sanction similar actions by the district court and the bankruptcy court.

Nor do In re Daumit, 25 B.R. 271 (Bankr. D. Md. 1982), or In re Silansky,

897 F.2d 743 (4th Cir. 1990), cited by the court of appeals (and by the district court) in support of the proposition that the debt assigned by the ex-Mrs. Magill to her lawyers was nondischargeable, resolve the issue. Daumit dealt only with whether attorney fees awarded in a divorce case qualified as alimony, maintenance or support. That is but the threshold requirement for application of Sec. 523(a)(5). Daumit did not at all deal with the exception to nondischargeability set out in Sec. 523(a)(5((A). Hence Daumit is not apposite with respect to that exception, which is at the heart of the instant case.

Silansky holds that a former wife's listing in her bankruptcy petition attorney fees owed to her lawyers pursuant to a divorce decree did not constitute an assignment of that debt to her bankruptcy

trustee and hence would not render the debt dischargeable in her former husband's subsequent bankruptcy proceeding. The issue there was whether Mrs. Silansky assigned the debt of the attorney's fees to the bankruptcy trustee, thus triggering the exception under [Section] 523(a)(5)(A). The Silansky court recognized that not only did Mrs. Silansky not assign her debt for the attorney fees to her lawyers, but that she had no such debt to assign, since the judgment there was in favor of the law firm. The court noted that "Mrs. Silansky had no property interest in the debt and hence had nothing to assign to the bankruptcy trustee." (897 F.2d at 744-745). There being in Silansky no assignment to another entity, nor even any possibility of such an assignment, the exception to nondischargeability contained in Sec.

523(a)(5)(A) was not and could not there be implicated. For that critical reason, Silansky (as well as Daumit) is inapposite here.

Nor is In re Spong, 661 F.2d 6 (2d Cir. 1981), which the court of appeals cited for the proposition that "dischargeability [is] determined by substance, not form, of liability" (App. 7), dispositive. Sec. 523(a)(5)(A) does not look to form of liability to trigger application of the exception to nondischargeability of an appropriate debt. Sec. 523(a)(5), which encompasses language identifying debts which can qualify for nondischargeability, necessarily is more likely, Magill suggests, to look to form rather than substance than is Sec. 523(a)(5)(A), which simply limits the reach of the provision (sec. 523(a)(5)) immediately preceding it.

This Court should review the decision of the court of appeals to assure that such misapplication by lower courts of an important federal statute such as Sec. 523(a)(5), entailing as it did in this instance entirely ignoring the applicable provisions of Sec. 523(a)(5)(A), does not remain uncorrected.

The decision of the court of appeals also may conflict with a decision of the Sixth Circuit in In re: Barry M. Perlin, Debtor / O'Connor, Cavanaugh, Anderson, Westover, Killingsworth & Beshears; and Brown-Wright & Associates v. Barry M. Perlin, No. 93-3705 (6th Cir., decided July 3, 1994) (Electronic Citation: 1994 FED App. 0241P (6th Cir.); File Name: 94a0241p.06) (Recommended for full-text publication pursuant to Sixth Circuit Rule 24). In that case the Sixth Circuit held that a bankruptcy debtor's former wife's

divorce case lawyer lacked standing to seek a determination that the debtor's obligation under a divorce decree to pay his former spouse's attorney fees because the Arizona court's divorce decree there involved awarded attorney fees to the former wife and not to her lawyers. The Perlin court, noting in part that both the bankruptcy court and the district court, while determining that the obligation was in the nature of alimony, maintenance or support and hence nondischargeable (there was no assignment of the debt in Perlin), recognized that the lawyer seeking the determination of nondischargeability lacked standing to do so, because the divorce decree directed payment of the fee to the former Mrs. Perlin and not to her attorney, and that Mr. Perlin's principal objection on appeal was such lack of standing.

The Perlin court, after discussing the concept of standing and distinguishing cases, including Spong and Silansky, supra, in which attorneys had been permitted to contest dischargeability of obligations to pay attorney fees arising from divorce cases, concluded that since the debtor owed the fee to his former wife, her lawyer lacked standing to challenge its dischargeability.

See also Memorandum Opinion of the court in Michael Anthony Garcia, Debtor / David L. Cooper and Lillian M. Garcia v. Michael Anthony Garcia, Case No. 93-43553-2, Adversary No. 94-4023-2 (United States Bankruptcy Court, Western District of Missouri, filed May 31, 1994) (Lawyers Weekly Publications Automated Opinion Service reference: Opinion 9903364), in which the court held that an award of attorney fees arising out of a divorce

case in which a judgment is entered directly to an attorney, rather than to one of the spouses, is dischargeable in bankruptcy because it "simply does not fulfill the requirements of the exception statute" (slip opinion at 5), 11 U.S.C. Sec. 523(a)(5). The court pointed out that: "The section is very clear that the debt must be to the spouse or ex-spouse or the children of the marriage relationship. The only exception is that one of those parties can assign their rights under the judgment to the state or federal government which has provided funds where the errant spouse has failed to pay." (Slip opinion at 4). The court also noted: "In this day and age when the Supreme Court has repeatedly said that courts are to follow the plain meaning of statutes, Rake v. Wade, ____ U.S. ____, 112 S.Ct. 2489. 1494-95 (1993); Pioneer

Inv. Serv. Co. v. Brunswick Associates, Ltd. Partnership, ____ U.S. ____, 113 S.Ct. 1439 (1993); United states v. Ron Pair Enter., Inc., 489 U.S. 235, 241 (1989), this Court is convinced that any award made directly to the attorney for the attorney's fees in a dissolution case could not be declared to be nondischargeable because such an award fails to meet the very strict requirements of [sec.] 523(a)(5)." (Id.)

While at first blush Perlin may not seem particularly apposite, because in the instant case Evans, George and Bronstein enjoyed the benefit of the modified divorce decree directing the attorney fees to be paid to Magill's former wife, rather than, as initially ordered, to that law firm, examination of the Memorandum and Ruling (App. 23) of the Maryland circuit court judge making that modification

indicates that despite the change thus made in the judgment of divorce the court, at least, thought that the attorney fees were really property of the former wife. He commented, for instance, that "it appears rather apparent to this Court that all awards of attorneys fees and expenses are made directly to a party in the case. There is a provision that the amount awarded may be made payable directly to the attorney but that does not lessen the fact that the award is made only to a party in the case." (App. 25). He continued: "If it is the decision of the Bankruptcy Court that these fees and expenses are to be considered in the nature of alimony and/or child support and thus non-dischargeable, then it seems rather disquieting to understand how a decision should turn on the designation of an attorney as the payee." (Id.)

That judge's comments would seem to support a conclusion that, despite the modification made in the divorce judgment, the real party in interest in connection with dischargeability or not of the instant attorney fees award still is the former Mrs. Magill and not her attorneys. If so, a substantial standing issue presents itself. Magill raised lack of standing as a defense asserted in his answer to the complaint in the adversary proceeding in the bankruptcy court, albeit not in the context now being discussed. However, whether or not raised in any of the courts below, standing, since a jurisdictional issue, cf. Heckler v. Mathews, 465 U.S. 728, 104 S.Ct. 387, 79 L.Ed.2d 646 (1984); People Organized for Welfare and Employment Rights v. Thompson, 727 F.2d 167 (7th Cir. 1984); Kerr-McGee Chem. Corp. v. U.S. Dept. of Interior, 709

F.2d 597 (9th Cir. 1983), is available as an issue even if not appropriately raised below.

Magill urges that the important question here presented warrants the attention of this Court, in part because of the potential reach and impact of the dischargeability issue, especially perhaps as it pertains to and can affect participants in domestic situations, in light of the modern proliferation of bankruptcy filings and the frequency of divorce litigation.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BENJAMIN LIPSITZ
Counsel of Record,
JAY FRED COHEN,
Attorneys for Petitioner

APPENDIX

App. 1

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In Re Douglas Edmund Magill, Plaintiff-Appellant v. Evans, George and Bronstein, Defendant-Appellee	No. 93-2426

Appeal from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, Senior District Judge. (CA-93-217-N, BK-92-5-923, BK-92-5241)

Submitted: April 29, 1994

Decided: August 10, 1994

Before HALL, HAMILTON, and MICHAEL, Circuit Judges

Affirmed by unpublished per curiam opinion.

COUNSEL

Jay Fred Cohen, Baltimore, Maryland, for Appellant. L. Robert Evans, Michael J. Chomel, EVANS, GEORGE & BRONSTEIN, Towson, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Douglas Edmund Magill appeals from the district court order affirming the bankruptcy court's determination that the award of attorney fees to his former wife in their divorce decree was not dischargeable in Magill's bankruptcy case. We affirm.

Pursuant to a divorce decree, the Circuit Court of [sic] Baltimore County, Maryland, ordered Magill to pay his ex-

wife's attorney fees. The court later modified the decree to provide that the fees were to be paid to Mrs. Magill, rather than directly to her law firm, Evans, George and Bronstein. Mrs. Magill then assigned to Evans, George and Bronstein, her right to payment from Mr. Magill. In her bankruptcy petition, Mrs. Magill listed Evans, George and Bronstein as a creditor and listed the attorney fees resulting from the divorce action as a debt. Her debts were discharged.

Mr. Magill subsequently filed a voluntary Chapter 7 petition in the bankruptcy court. He listed the attorney fees owed to Evans, George and Bronstein as a debt. Magill was granted a discharge of "all dischargeable debts."

Evans, George and Bronstein filed an adversary proceeding in the bankruptcy court, seeking a determination that the

debt owed them by Mr. Magill was not discharged in his bankruptcy case. Evans, George and Bronstein asserted that the debt was in the nature of "alimony, maintenance and support" and was nondischargeable under 11 U.S.C.A. [sec.] 523(a)(5) (West 1993). The bankruptcy court granted summary judgment for Evans, George and Bronstein, finding that the debt was non dischargeable and was valid and subsisting. The district court affirmed the bankruptcy court's order, finding that a hearing was not necessary because Magill failed to show that any facts were in dispute.

Magill appealed the district court's order, contending that a hearing should have been conducted to determine whether

the award of attorney fees was in fact alimony, maintenance, or support.* He also contends that the debt was dischargeable under the assignment clause of [sec.] 523(a)(5)(A).]

Magill failed to present any factual evidence to support his contention that summary judgment was improper. See Fed. R. Civ. P. 56(e); Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The only issue before the court was whether the fee award was discharged in Magill's bankruptcy. This legal question was

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*Magill denies having conceded in the district court that the fee award was alimony, support, or maintenance. His submissions to this Court appear to support his concession of this issue. Conceded or not, the award of attorney fees under the divorce decree are in the nature of alimony, support, or maintenance. In re Daumit, 25 B.R. 371, 373 (Bankr. D. Md. 1982); see In re Silansky, 879 F.2d 743 (4th Cir. 1990).

properly determined without an evidentiary hearing.

Section 523(a)(5)(A) excepts from discharge, a debt to a spouse or former spouse for alimony, maintenance, or support in connection with a divorce decree, "but not to the extent that -- (A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise." 11 U.S.C.A. [sec.] 523(a)(5)(A) (West 1993). Payment of the support, maintenance, or alimony need not be paid directly to the spouse or ex-spouse. In re Calhoun, 715 F.2d 1103, 1107 (6th Cir. 1983); see In re Spong, 661 F.2d 6, 10-11 (2d Cir. 1981). Because the assignment to her attorney of the counsel fees awarded to a debtor's ex-wife does not render dischargeable the debtor's liability to the attorney, Daumit, 25 B.R. at 373, we find that the fee award to Mrs.

Magill, in the nature of alimony, support and maintenance, is not rendered dischargeable in Mr. Magill's bankruptcy proceeding by the assignment of the award to Evans, George and Bronstein. See Spong, 661 F.2d at 9 (dischargeability determined by substance, not form, of liability).

Mr. Magill's debt, in the nature of alimony, maintenance and support, is not dischargeable in his bankruptcy proceeding. Silansky, 897F.2d at 744-45; see 11 U.S.C.A. [sec.] 523(a)(5). We therefor affirm the

district court order affirming the bankruptcy court's determination that the debt owed by Magill to Evans, George and Bronstein was nondischargeable. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DOUGLAS EDMUND MAGILL	*	
		Civil
V.	*	Action
		No. N-93-217
EVANS, GEORGE AND BRONSTEIN	*	

* * * * * * * *

MEMORANDUM

Currently pending before the Court is Appellant Douglas Edmund Magill's bankruptcy appeal. Both Magill and Appellee Evans, George and Bronstein ("EGB") have filed briefs with the Court. Paper Nos.3 & 4. Upon a review of the record and the applicable case law, the Court concludes that a hearing is not necessary (Bankruptcy Rule 8012) and that the decision of the Bankruptcy Court should be affirmed.

BACKGROUND

Douglas Edmund Magill and Barbara L. Magill were divorced in 1987. As part of

the divorce decree, entered December 3, 1987, the Circuit Court for Baltimore County awarded attorneys fees to Mrs. Magill's counsel. On January 19, 1988, the Court clarified the order. Under the amended decree, the fee award was made in favor of Mrs. Magill herself, rather than her attorneys, and payment was to be made directly to Mrs. Magill. Mrs. Magill subsequently assigned her right to payment to counsel, EGB.

Mrs. Magill filed a voluntary bankruptcy petition sometime during 1989. She listed EGB as one of her creditors. The debt to EGB was discharged pursuant to the bankruptcy proceeding.

On February 2, 1992, Mr. Magill filed a voluntary Chapter 7 bankruptcy petition. He listed EGB as one of his creditors. On May 1, 1992, EGB filed the instant adversary proceeding, seeking a

determination that fees awarded in the divorce decree were not dischargeable in the bankruptcy proceeding. Along with the complaint, EGB submitted a memorandum of law in support of its claim. In its memorandum, EGB argued that the award constituted "alimony, maintenance, and support" under the Bankruptcy Code and was, therefore, nondischargeable. Magill answered the complaint but did not file a memorandum of law countering EGB's legal argument. EGB later filed a motion for summary judgment on the claim, referring back to the memorandum of law and exhibits submitted with the complaint. Mr. Magill responded to the motion for summary judgment by denying what he terms EGB's "allegation" that the debt was nondischargeable. He did not, however, make any legal argument or cite any authority in opposition to EGB's argument

that the debt was nondischargeable as a matter of law.

On the basis of the written record, the Bankruptcy Court granted EGB's motion, determining that the attorneys fees were not dischargeable in bankruptcy. Mr. Magill now challenges that ruling in the instant appeal.

STANDARD OF REVIEW

This Court reviews the Bankruptcy Court's findings of fact under the clearly erroneous standard. Bankruptcy Rule 8013. Conclusions of law are reviewed de novo. In re Hollis, 150 B.R. 145, 147 (D. Md. 1993).

ANALYSIS

Mr. Magill argues that the Bankruptcy Court's ruling was in error for two reasons. First, he contends that the Court should not have ruled on the motion

without holding an evidentiary hearing. Second, he maintains that the Court erred as a matter of law by holding that the fee award was not dischargeable. For the reasons that follow, the Court rejects both arguments.

Turning to the first issue, the Court finds that no evidentiary hearing was necessary in this case. EGB points out, and the Court agrees, that the facts of this case are not in dispute. Mr. Magill has not identified any facts that could have been developed in an evidentiary hearing that were not already in the record. Thus, an evidentiary hearing would not have served any purpose, and the Bankruptcy Court did not err by deciding the motion on the written record.

Magill's second argument is that the fee award was a dischargeable debt. Under the Bankruptcy Code, 11 U.S.C. [sec.]

523(a)(5), alimony, maintenance, or support payments cannot be discharged in bankruptcy except under certain circumstances:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt --
>
> (5) to a spouse, former spouse, or child of the debtor for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with state or territorial law by a governmental unit, or property settlement agreement, but not to the extent that --
>
> (A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise . . . .

Magill concedes that attorneys fee awards pursuant to divorce decrees "are within the definition of alimony,

maintenance, and support" and are, therefore, ordinarily nondischargeable. In re Daumit, 25 B.R. 371, 373 (Bankr. D. Md. 1982) and cases cited therein; see also In re Silanksy, 897 F.2d 743, 744 (4th Cir. 1990) (attorneys fees constitute alimony, maintenance, or support as defined in the Bankruptcy Code). According to Magill, however, the fees in this case became dischargeable for two reasons. First, he contends that Magill [sic] assigned the right to payment to EGB, thereby triggering the exception to nondischargeability in 11 U.S.C. [sec.] 523(a)(5)(A). Second, because Mrs. Magill's debt to EGB for attorneys fees was discharged in a separate bankruptcy proceeding, Mr. Magill argues that his obligation to pay attorneys fees also should be discharged. The Court is unpersuaded by Mr. Magill's arguments.

In Daumit, the Bankruptcy Court held that counsel fees awarded in a divorce proceeding do not become dischargeable under 11 U.S.C. [sec.] 523(a)(5)(A) when the right to payment is assigned to the attorney. In the Daumit case, the divorce decree awarded counsel fees to the defendant's ex-wife, who then assigned her interest to her attorneys. The defendant ex-husband then filed a bankruptcy petition and sought to avoid the debt to the law firm on the ground that the assignment rendered the award nondischargeable. 25 B.R. at 372. The Bankruptcy Court rejected the ex-husband's position, reasoning that [sec.] 523(a)(5)(A) did not apply to assignment of counsel fees:

> The assignment clause under [sec.] 523(a)(5)(A) does not pertain to assignment of counsel fees by a spouse to his or her attorney. Congress' concern in

> formulation of [sec.] 213(a)(5)(A) was not to deter all assignments of payments, but only those made to state welfare agencies.
>
> Accordingly, it is apparent that the award as counsel fees, although assigned and enforced by plaintiff, remains nondischargeable under [sec.] 523(a)(5)(A).

Id. at 373 (emphasis in original, citations omitted). Daumit is dispositive of Mr. Magill's argument. Mrs. Magill's assignment to EGB did not trigger the exception to nondischargeability in 11 U.S.C. [sec.] 523(a)(5)(A).

Mr. Magill also argues that Mrs. Magill's discharge of debt to EGB in her bankruptcy petition renders the debt dischargeable by him. The Fourth Circuit recently rejected this argument in a case analogous to the case at bar. In re Silansky, 897 F.2d 743 (4th Cir. 1990). As a result, Mr. Magill's second argument also fails.

In Silansky, Mr. Silansky was ordered in a divorce decree to pay his ex-wife's attorneys fees. Mrs. Silansky subsequently filed for bankruptcy, listing the divorce judgment as property of her estate and her attorneys as one of her creditors. Mr. Silansky then filed for bankruptcy, also listing the law firm as a creditor. The Fourth Circuit ruled that Mrs. Silanky's inclusion of the debt in her bankruptcy proceeding did not render the debt nondischargeable [sic] by Mr. Silansky. Id. at 744. Similarly, in this case, Mr. Magill has not demonstrated how Mrs. Magill's bankruptcy proceeding in any way affects his obligation to pay the attorneys fees under the divorce decree.

CONCLUSION

This Court concludes that Mrs. Magill's assignment of the right to

payment to EGB does not alter the character of the award under the circumstances of this case. In addition, Mr. Magill has failed to persuade the Court that Mrs. Magill's bankruptcy proceeding affects his obligations pursuant to the divorce decree. Accordingly, the order of the Bankruptcy Court will be affirmed.

A separate Order will issue.

/s/ Edward S. Northrop
/t/ Edward S. Northrop
Senior United States
District Judge

Dated: October 1, 1993.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

IN RE:	*	
DOUGLAS EDMUND MAGILL	*	CASE NO. 92-20923JS
Debtor	*	
* * * *	* * * *	
EVANS, GEORGE AND BRONSTEIN	*	
	*	
Plaintiff	*	
v.	*	
DOUGLAS EDMUND MAGILL	*	ADVERSARY NO. 92-5241JS
Defendant		
* * * *	* * * *	

ORDER DETERMINING DEBT TO BE
NON-DISCHARGEABLE UNDER
11 U.S.C. SECTION 523(A)(5)

Upon consideration of the Complaint to Determine Non-dischargeability of Debt under 11 U.S.C. Section 523(a)(5), and Motion for Summary Judgment, the response thereto of Debtor and Defendant, Douglas Edmund Magill, if any, and other matters

of record, it is this 2nd day of December, 1992, by the United States Bankruptcy Court for the District of Maryland,

ORDERED, that the debt of Evans, George and Bronstein, Plaintiff, against Defendant and Debtor, Douglas Edmund Magill, in the amount of Seventy-Eight thousand Five Hundred Thirty Seven Dollars and Twelve Cents ($78,537.12) through March 31, 1992, plus such interest as may accrue thereafter, is still valid and subsisting.

/s/ James F. Schneider
U.S. Bankruptcy Judge

BARBARA L. MAGILL	*	IN THE
	*	
Plaintiff and Counter-Plaintiff [sic]	*	CIRCUIT COURT
	*	FOR
	*	
V.	*	BALTIMORE COUNTY
	*	
DOUGLAS E. MAGILL	*	
	*	Case No. 11/230
Defendant and Counter-Plaintiff	*	85CSP2187

****

JUDGMENT OF DIVORCE

This cause having come for hearing in open court and testimony having been heard and considered by this Court:

It is thereupon this 3rd day of December, 1987, by the Circuit Court for Baltimore County, ADJUDGED AND ORDERED, that Douglas E. Magill, Defendant and Counter-Plaintiff be, and is hereby granted an absolute divorce from Barbara L. Magill, the Plaintiff and Counter-Defendant, on the ground of a two-year statutory no-fault separation.

* * * * *

AND IT IS FURTHER ORDERED, that Douglas E. Magill pay the costs of ths [sic] proceeding, and shall contribute to the attorney's fees and expenses incurred by Barbara L. Magill in connection with this proceeding as follows:

a) The sum of $55,000.00 to the law firm of Evans, George & Bronstein for counsel fees and expenses rendered in connection with this proceeding, for which amount a money judgment is hereby entered in favor of said law firm against Douglas E. Magill;

* * * * *

/s/ John F. Fader, II
/t/ JOHN F. FADER, II
JUDGE

Chambers of
JOHN F. FADER II
Judge

January 19, 1988

MEMORANDUM OPINION AND RULING

Magill; v. Magill
Case No: 85 CSP 2187

Motion to Revise Judgment (paper 184) filed by Barbara L. Magill: Granted in part and denied in part.

The Judgment of Divorce dated December 3, 1987 (paper 181) is modified in the following respects:

* * * * *

2. The award of attorneys fees in the amount of $55,000 and other expenses in the amount of $12,000 is made in favor of Barbara L. Magill as the contribution by Douglas E. Magill to the costs, fees and expenses incurred by Mrs. Magill. The payment is to be made directly to Barbara L. Magill.

* * * * *

The Court makes the following comments:

* * * * *

D. As to the award of attorneys fees and expenses.

The Court was not aware of the activity in various Bankruptcy Courts over the issue of the dischargeability of awards of attorneys fees and expenses awarded in domestic cases. This Court intended to make its award under Fam. Law. [sic] Section 11-110 and 12-103. Section ii0 provides in pertinent part:

> (b) Authority of court.---At any point in a proceeding under this title, the court may order either party to pay to the other party an amount for the reasonable and necessary expense of prosecuting or defending the proceeding.
>
> . . .
>
> (e) Counsel fees.---As to any amount awarded for counsel fees, the court may:
>
> (1) order that the amount

> awarded be paid directly to the lawyer; and
>
> (2) enter judgment in favor of the lawyer.

However problematical the thrust of this section may be to the Bankruptcy Court, it appears rather apparent to this Court that all awards of attorneys fees and expenses are made directly to a party in the case. There is a provision that the amount awarded may be made payable directly to the attorney but that does not lessen the fact that the award is made only to a party in the case.

If it is the decision of the Bankruptcy Court that these fees and expenses are to be considered in the nature of alimony and/or child support and thus non-dischargeable, then it seems rather disquieting to understand how a decision should turn on the designation of an attorney as the payee.

In any event, the Court reviewed the proceedings at the time the award was made with the court reporter who took the testimony. That review shows the award was made of attorneys fees and expenses without a designation that the monies were to be paid to any individual other than Barbara L. Magill. This modification in the order clarifies the Court [sic] position in that regard. When proposed judgments are presented to the Court and not objected to by either side and the words there appear to recite the direction by the Court from the bench, that Order is signed. Clarification is in order in this case.

A hearing was requested in this case but the Court determines that no hearing should be held. For the most part, this modification constitutes nothing more than

a clarification of the position stated from the bench. * * * *

/s/ John F. Fader II
/t/ John F. Fader II, Judge

SUPREME COURT, U.S.
FILED
JAN 10 1995
OFFICE OF THE CLERK

No. 94-842

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

DOUGLAS EDMUND MAGILL,

Petitioner

V.

EVANS, GEORGE AND BRONSTEIN,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

L. ROBERT EVANS,
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EVANS, GEORGE AND BRONSTEIN

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No. 94-842

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

DOUGLAS EDMUND MAGILL,

Petitioner,

-V.

EVANS, GEORGE AND BRONSTEIN,

Respondent,

BRIEF IN OPPOSITION TO PETITION

FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Evans, George and Bronstein, Respondent, invites the attention of this Court to the fact that Petitioner, Douglas Edmund Magill, has failed to preserve for consideration by this Court the issues raised in his Petition

for Writ of Certiorari. The Petition for Writ of Certiorari raises two main points. The first is: that the otherwise non-dischargeable debt of Respondent for payment of his former wife's attorney fees in a State Court divorce case was rendered dischargeable because it was assigned by Petitioner's former wife to her attorneys (Respondent) pursuant to 11 U.S.C. Sec. 523(a)(5)(A); secondly, Petitioner claims that Respondent lacked standing to file a complaint to determine non-dischargeability of debt in the United States Bankruptcy Court for the District of Maryland.

It should be observed that Petitioner failed to raise either of these issues in the bankruptcy court. Although Petitioner raised the issue of standing in the Bankruptcy Court, it was in a different context; as conceded in the Petition, the standing objection raised by Petitioner in the bankruptcy court was limited

to the sole contention that Respondent (attorneys) had no standing

> "because of the Bankruptcy filing by (Petitioner's former wife), Barbara Magill for that any monies due as a result of any award of attorney's fees would be an asset of her Bankruptcy estate and only the trustee would have standing"

to bring an action to determine non-dischargeability of that debt. (Appendix at page 1-2). Petitioner did not raise in his Petition the standing issue he now urges on this Court in his Petition, viz., that Respondent attorneys lack standing to raise the dischargeability, vel non, of an award of attorney fees in a state court divorce proceeding.

Nor did Petitioner raise before the Bankruptcy Court the issue under 11 U.S.C. Sec. 523(a)(A) that the assignment by Petitioner's former wife to Respondent attorneys rendered the (otherwise

nondischargeable debt) dischargeable in Petitioner's Chapter 7 Bankruptcy proceeding. (Appendix at page 1-4) The failure of Petitioner to raise before the bankruptcy court the issues he now asserts in the Petition warrants denial of the Petition.

The general rule is that issues must be properly raised below before they will be considered by this Court. Thus, in Sunray Mid-Continent Oil Company v. Federal Power Commission, 364 U.S. 137, 80 S.Ct. 1392, 4 L.Ed.2d 1623, rehearing denied, 364 U.S. 856, 81 S. ct 32, 5 L.Ed. 2d. 80 (1960), this Court held that a point not raised before the Federal Power Commission would not be considered under a grant of Certiorari to review the affirmance of an order of the Commission affirmed by the Court of Appeals. Similarly, in F.T.C. v. Grolier, Inc., 462 U.S. 19, 23 n. 6, 103 S. Ct. 2209, 2212 n.

6,76 L.Ed. 2d. 387 (1983), this Court declined to address an issue that was not raised before the District Court or the Court of Appeals. And in Dothard v. Rawlinson, 433 U.S. 321, 323 n.1, 17 S. Ct. 2720, 2724 n.1, 53 L.Ed. 2d. 786 (1977) the Court ruled that an issue not raised in the District Court was not properly before it on direct appeal from the District Court.

The Petitioner failed to raise before the bankruptcy court the two issues he now seeks to present to this Court. Under these circumstances, he should be deemed to have waived any complaints on these two points and the Petition for Writ of Certiorari should be denied.

ARGUMENT

I.

REASONS FOR DENIAL OF WRIT

This case presents no novel question of law, nor does it raise a matter of sufficient importance for consideration by this Court. Rule 10.1 of the Rules of the Supreme Court of the United States provides that a review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only when there are special and important reasons therefor. Id. The basis of the Petition in this case appears to be based on the provisions of Rule 10.1.(a) which provides that:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter, or has decided a federal question in a way

> in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

Not one of these bases is present in the instant case. A principal purpose for which this Court uses its certiorari jurisdiction is to resolve conflicts among the Circuit Courts of Appeal and state courts concerning the meaning of provisions of federal law. Braxton v. United States _____U.S. _____, 111 S.Ct. 1854, 114 L.Ed. 2d. 385 (1991).

Although Petitioner alludes to the fact that the decision of the Court of Appeals below "may conflict with or differ from a decision of another circuit court" (Petition at page 11), Petitioner fails to cite a single case from another jurisdiction in conflict with the decision below by the United States Court of Appeals for the Fourth Circuit. This

Court is not, therefore, presented with a situation involving a conflict between Circuit Courts of Appeal within the ambit of Rule 10.1.(a).

Secondly, the decision below is consistent with that of the Second Circuit In Re Spong, 661 F.2d 6 (2d Cir. 1981), which recognized that the dischargeability of a debt should be determined by the substance, not the form, of that liability. Petitioner in this case is seeking to avoid responsibility for a state court debt rendered in a divorce proceeding. That debt was clearly in the nature of alimony and support within the scope of 11 U.S.C. Sec. 523 (a)(5). In Re Daumit, 25 BR ;371 (Bkrtcy D. Md. 1982).

Indeed, even had no assignment occurred, Petitioner would argue that he should be relieved of his obligation. In the Petition (at pages 22-29), Petitioner argues that the

debt should be discharged even if made payable directly to his ex-wife's attorneys and not to his ex-wife who subsequently assigned it to them. All Petitioner seeks is to avoid his lawful obligation. This is not the proper forum in which Petitioner's obdurate refusal to acknowledge his lawful obligations should be approved.

II.

THE OBLIGATION OF PETITIONER IS IN THE NATURE OF ALIMONY AND SUPPORT WITHIN THE AMBIT OF 11 U.S.C. Sec. 523(a)(5).

The Petitioner appears to contend that his obligation to make payment of attorney's fees imposed upon him by the state court in a judgment of divorce did not constitute an obligation "in the nature of alimony, support and maintenance" within the scope of 11 U.S.C. Sec. 523(a)(5). As the United States Court of Appeals for the Fourth Circuit observed in In re Silansky, 897 F.2d 743(4th Cir. 1990), most courts have classified an award of attorney's fees in a divorce judgment as a non-dischargeable debt in the category of alimony, maintenance and support under Sec. 523(a)(5). See, also, In re Azia, 159 BR 71 (Bkrtcy. D.Mass. 1993). The determination of whether an attorney's fee award is non-dischargeable

because it is for the support of the spouse or child must be determined based on the character of the underlying proceedings, rather than on who was to receive the attorney's fees. In Re Ray, 153 BR 937 (D.Colo. 1992). [1]

---

[1] The district court below found that Petitioner had conceded that the fee award issued in this case was in the nature of alimony, support or maintenance. The court of appeals, below, observed below that the documents before that court supported a finding that Petitioner had conceded this issue. (Opinion at page 3).

III.

THE AWARD OF ATTORNEY'S FEES AT ISSUE IN THIS CASE IS A NON-DISCHARGEABLE DEBT OWED BY PETITIONER.

11 U.S.C., § 523(a)(5) excepts from discharge under the Bankruptcy Code, a debt:

> (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, with a separation agreement, divorcee decree or other order of a court of record, determination made in accordance with State or territorial law by governmental unit, or property settlement agreement, but not to the extent that --
> (A) such debt is assigned to another entity, voluntarily by operation of law, or otherwise (other than debts assigned pursuant to Section 402(a)(26) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such state); or
> (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support; . . .

It was held under Section 17a(7) of the

former Bankruptcy Act (from which current § 523(a)(5) was derived) that an award for counsel fees under a statute permitted a court to require payment of such fees by the husband (as alimony) was non-dischargeable. See, Damon v. Damon, 283 F.2d 571 (1st Cir. 1960) (applying Maine law).

As one commentator has observed, the congressional intent behind § 523 (a)(5) makes clear that what constitutes alimony, maintenance, or support will be determined under the bankruptcy laws, not State law. See 3 Collier on Bankruptcy, Paragraph 423.15(1), at page 523-117 (15th Edition, 1993), citing H.R. Rep. No. 595, 95th Cong. 2nd Sess. 363 (1977) and S. Rep. No. 989, 95th Cong., 2d. Sess. 77-79 (1978).

In the case of In Re Daumit, Supra, the United States Bankruptcy Court for the District of Maryland held that an award of

counsel fees and court costs to the debtor's spouse under a court order providing pendente lite relief was in the nature of alimony within the meaning of § 523(a)(5). The court held that although the counsel fees awarded to the debtor's former wife had been assigned by her to the firm representing her (as here) they nevertheless remained non-dischargeable under § 523 (a)(5).

The qualification in § 523 (a)(5)(A) that the non-dischargeability is lost if the debt is assigned either voluntarily or by operation of law is an innovation from practice under the former Bankruptcy Act. 4 Collier Bankruptcy Practice Guide, Paragraph 76.08 at page 76-32 (Matthew Bender, 1993). This statutory language has been construed to mean that if the spouse assigns an obligation to a creditor (as, for example, a finance company), the non-dischargeability is lost. Id., citing

In re Lovett, 6 BR 270 (Bkrtcy. Utah, 1990).

The issue of whether or not the assignment by a non-debtor spouse to her attorneys of a debt in the nature of alimony or child support would render that debt dischargeable in bankruptcy was raised in the Daumit case. Judge Mannes rejected the debtor's contention that the assignment by the wife to her attorneys rendered the debt dischargeable, saying:

> Moreover, although the counsel fees awarded defendant's ex-wife have been assigned to plaintiff (attorneys), they nevertheless remain non-dischargeable pursuant to 11 U.S.C.§ 523(a)(5)(A). The court finds no merit in defendant's contention that plaintiff's enforcement of the assignment has altered it so as to remove it from the realm of alimony. The assignment clause under § 523(a)(5)(A) does not pertain to assignment of counsel fees by a spouse to his or her attorney. Congress' concern in formulation of § 523(a)(5)(A) was not to deter all assignment of payments, but only those made to state welfare agencies.

* * * * *

> Accordingly, it is apparent that the award of counsel fees, although assigned and enforced by plaintiff, remains non-dischargeable under § 523(a)(5)(A).

25 B.R. at 373 (emphasis in the original; citation omitted). See also, In re Auer, 22 BR 274 (Bkrtcy. E.D. NY 1982) (provision of divorce decree which required debtor to pay his ex-wife's attorney's fee was in the nature of alimony and support and therefore non-dischargeable, notwithstanding its assignment to ex-wife's attorneys).

In the case of In Re Spong, Supra, the United States Court of Appeal for the Second Circuit considered this issue and concluded that it would amount to exalting form over substance to draw a distinction between counsel fees paid to a spouse and fees directed to be paid to the spouse's attorney, and concluded that the debtor's obligation to

pay the debtor's spouse's counsel fees is non-dischargeable and such fees are in the nature of alimony, maintenance or support. This point was also expressed by the United States Court of Appeals for the Eighth Circuit in the case of In Re Williams, 703 F.2d. 1055, 1057 (8th Cir. 1983), where the court said:

> Debts payable to third persons can be viewed as maintenance or support obligations; the crucial issue is the function the award was intended to serve.

(citations omitted)

There is no distinction between the award to Petitioner's ex-wife which was assigned to the Respondent in this case, and the situation in which the debtor is obligated to make payments directly to third parties. A number of courts have recognized that debts payable by a debtor to third parties may be non-dischargeable under 11 U.S.C. Sec. 523(a)(5). See e.g. In re Livengood, 157 BR 678 (Bkrtcy.

D.Idaho 1993) (mere fact that claim exists on behalf of third party, other than spouse or child, does not necessarily preclude it from qualifying as non-dischargeable "alimony, maintenance or support" obligation); In re McCord, 151 BR 915 (Bkrtcy. E.D. Mo. 1993) (debts owed to third parties may still be in nature of non-dischargeable "support or maintenance" obligation). This principle has been applied to attorney's fees. See In re Spong, supra.

CONCLUSION

Petitioner has failed to establish special and important reasons for granting the Writ of Certiorari in this case. Petitioner is unable to point to any conflict between decisions of United States Courts of Appeal. Nor does the Petition in this case raise a question which merits the consideration of this Court. For these reasons, it is respectfully submitted by Respondent that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent

APPENDIX

APP.1

IN THE U.S. BANKRUPTCY COURT FOR THE DISTRICT OF MARYLAND

IN RE:	*	CASE 92-50923-JFS
DOUGLAS E. MAGILL	*	
Debtor	*	
* * * * * * * * * *		
EVANS, GEORGE AND	*	ADVERSARY NO.
BRONSTEIN	*	92-5241-JFS
Plaintiff	*	
v.	*	
DOUGLAS E. MAGILL	*	
Defendant	*	
* * * * * * * * * *		

ANSWER TO COMPLAINT
TO DETERMINE DISCHARGEABILITY

Douglas E. Magill, by and through his attorney, Jay Fred Cohen files this answer to the Complaint to Determine Dischargeability and says:

1. Paragraph 1, 2, 3, of the Complaint

are admitted.

2. The allegations contained in paragraph 4 are denied in part and admitted in part as follows:

a. Magill admits that he was married to Barbara Magill and divorced.

b. Magill denies all other parts of the allegations.

3. The Defendant denies the allegations contained in paragraph 5 of the Complaint.

4. The allegations contained in paragraph 6, 7 and 8 of the Complaint are denied.

AFFIRMATIVE DEFENSE

A. The Defendant further says that Barbara A. Magill filed a Petition in Bankruptcy in the United States Bankruptcy Court for the District of Maryland and listed

as one of her creditors the Plaintiff in this action. That she was discharged and her debt to the Plaintiffs in this case was also discharged.

B. The Plaintiffs have no standing in this matter because of the Bankruptcy filing by Barbara Magill for that any monies due as a result of any award of attorney's fees would be an asset of her Bankruptcy estate and only the trustee would have standing to bring this action.

WHEREFORE, the Defendant having fully answered the Complaint requests this Court to dismiss the Complaint, and for such other and further relief as justice may require.

Jay Fred Cohen
100 Church Lane
Baltimore, Maryland 21208
410-484-3050
Attorney for Defendant

APP. 4

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the aforesaid answer was mailed by first class mail to the following on this day of June, 1992.

L Robert Evans, Esquire
205 Susquehanna Bldg.
29 West Susquehanna Avenue
Towson, Md. 21204

Wilbur W. Bolton, III, Esquire
Trustee
102 South Park St.
Aberdeen, Md. 21001

_____
J. Fred Cohen

APP. 5

IN THE U.S. BANKRUPTCY COURT FOR THE DISTRICT OF MARYLAND

IN RE:	*	CASE 92-50923-JFS
DOUGLAS E. MAGILL	*	
Debtor	*	
* * * * * * * * * *		
EVANS, GEORGE AND	*	ADVERSARY NO.
BRONSTEIN	*	92-5241-JFS
Plaintiff	*	
v.	*	
DOUGLAS E. MAGILL	*	
Defendant	*	
* * * * * * * * * *		

ANSWER TO MOTION FOR SUMMARY JUDGMENT

Douglas E. Magill, by and through his attorney, Jay Fred Cohen files this answer to the Motion for Summary Judgment filed by the Plaintiff and says:

1. Paragraph 1, 2, of the Motion are

admitted.

2. The allegations contained in paragraph 3 are neither admitted or denied except that a copy proposing to be an assignment of a judgment is attached to the motion.

3. The allegations contained in paragraph 4 of the motion are denied and the defendant further states that the debt is not in the nature of support and is dischargeable in this proceeding.

4. The allegations contained in paragraph 5 are denied and further states that the claim being made is for the payment of a judgment and is fully dischargeable in this bankruptcy proceeding.

5. The allegations contained in paragraph are without merit because the defendant has filed a petition in bankruptcy

and the debt alleged to be due is fully dischargeable.

WHEREFORE, having fully answered the Plaintiff's motion for summary judgment the defendant requests this Court to deny this motion and if necessary to set this matter in for trial.

Jay Fred Cohen
100 Church Lane
Baltimore, Maryland 21208
410-484-3050
Attorney for Defendant

APP.8

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the aforesaid answer was mailed by first class mail to the following on this day of June, 1992.

L Robert Evans, Esquire
205 Susquehanna Bldg.
29 West Susquehanna Avenue
Towson, Md. 21204

Wilbur W. Bolton, III, Esquire
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_____
J. Fred Cohen